SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-300

I. I. ROSEN,

Petitioner,

versus

LINDA N. LAWRENCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

I. I. ROSEN,

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versus

LINDA N. LAWRENCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner I. I. Rosen respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 25, 1974.

OPINION BELOW

The judgment of the Court of Appeals appears in the Appendix hereto. The judgment was rendered without opinion. The judgment has not been reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 25, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that abortions were illegal under state law and were not considered acceptable among medical practitioners in 1969 may be used at trial to establish medical malpractice which allegedly occurred during an attempted abortion.

2. Whether a federal trial judge may comment upon evidence and conduct the trial in such manner as to reveal his opinion to the jury regarding the ultimate facts of the case.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Linda Lawrence, respondent herein, brought this action in the United States District Court for the Eastern District of Louisiana, New Orleans Division, against Dr. I. I. Rosen, petitioner herein, as well as the Sheriff and a Deputy Sheriff of Tangipahoa Parish, Louisiana. Jurisdiction was based upon diversity of citizenship, since Mrs. Lawrence was a citizen of Minnesota and the defendants at trial were citizens of Louisiana. Mrs. Lawrence alleged medical malpractice against Dr. Rosen and negligence against the Sheriff and his Deputy.

At the trial Mrs. Lawrence established, and it was not disputed, that she had been hired by the Sheriff of Tangipahoa Parish and his Deputy to do undercover work in an effort to develop a criminal case against Dr. Rosen for performing abortions in the City of Amite, Louisiana during 1969. Dr. Rosen is a physician in Amite, where he owns a clinic, and during 1969 there were criminal sanctions in Louisiana against performing abortions even during the first trimester of pregnancy.

Pursuant to their plan to obtain evidence against Dr. Rosen, the Sheriff and Mrs. Lawrence arranged to have Mrs. Lawrence pose as a pregnant woman and request an abortion. She did so and presented Dr. Rosen with a urine specimen obtained from a pregnant woman, in order to persuade him that she was in fact pregnant. Dr. Rosen examined her, and later agreed to perform the abortion. Several weeks after

the initial examination, Mrs. Lawrence went to the Rosen Clinic for the abortion procedure. She was administered a sedative, and the abortion procedure began. Shortly thereafter Sheriff's deputies entered Dr. Rosen's clinic, placed him under arrest, and terminated the dilation and curretage procedure which Dr. Rosen was about to begin. Thereafter, Mrs. Lawrence testified, she noticed some spotting of blood and later was examined by a gynecologist who diagnosed a punctured uterus. She spent a week in the hospital for observation and was released. Based upon the foregoing, and for psychological damage which Mrs. Lawrence said she received, the jury below awarded her $10,000.00 in damages. Judgment was rendered against Dr. Rosen, but the Sheriff and his Deputy were found not liable to Mrs. Lawrence for their failure to intervene at a sufficiently early time to prevent her alleged injury. At the trial Dr. Rosen denied any malpractice, denied puncturing Mrs. Lawrence's uterus, and denied any injury to her. After post-trial motions were denied, Dr. Rosen appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the trial court on July 25, 1974, without opinion.

At the trial Mrs. Lawrence's case against Dr. Rosen was based upon the allegation that injury had occurred during an "illegal" abortion. The only illegality alleged was the state criminal sanction against any non-therapeutic abortions, prior to *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, and *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705. The principal medical witness for Mrs. Lawrence was a gynecologist, who testified that a

biopsy of the uterus, such as Dr. Rosen intended to perform, was not in keeping with generally accepted medical practice because it would "run a grave risk of disturbing a normal type pregnancy." (T. 87) A physician who examined Mrs. Lawrence after she left Dr. Rosen's clinic testified, over objection by Dr. Rosen's counsel, to the "illegality" of non-therapeutic abortions in Louisiana in 1969. (T. 90) Counsel for Mrs. Lawrence in final argument used this testimony to establish malpractice:

> "It was illegal, it shouldn't have been done, and in accepted medical practice and procedure, they simply do not do it, and if they do perform a procedure of this kind, for some reason, these two men said they would perform it in a hospital." (T. 293)

The transcript shows that the trial court accepted the theory of the case presented by Mrs. Lawrence that abortions constituted malpractice because an abortion was illegal and not accepted medical practice in Louisiana in 1969. When Dr. Rosen's counsel sought to establish on cross-examination of an opposing witness that Dr. Rosen would not have had time to perforate Mrs. Lawrence's uterus, he asked the witness to assume that Dr. Rosen was under no pressure from the standpoint of time. The Court then interrupted him:

> "THE COURT: Well now, I don't think that question is quite fair, because the doctor [Rosen] admitted on the witness stand that he was performing an illegal operation. How

> can you proceed with a question with regard to something that was being done illegally? *But go ahead; the jury will understand.* You can answer the question. (Emphasis supplied) (T. 200)

On other occasions the trial judge, by his conduct and comment, demonstrated his prejudgment of the ultimate facts of the case in favor of Mrs. Lawrence. Examples:

1. Once, in terminating a line of questioning by Dr. Rosen's counsel, the Court commented, "The evidence is that he [Dr. Rosen] punctured the womb." (T. 151)

2. During the early part of the trial, while Mrs. Lawrence was testifying, the Court sought more detailed information from her regarding the fact that a deputy had told her that he had recovered a fetus from a garbage can outside Dr. Rosen's clinic. (T. 79) When the deputy took the witness stand, the Court brought the subject up again and questioned the deputy about it. (T. 221, 222) When Dr. Rosen's counsel objected, the Court sustained counsel's objection to the Court's own question. (T. 222) The deputy was later questioned by counsel for the Sheriff regarding the finding of the fetus outside Dr. Rosen's clinic. When counsel for Dr. Rosen objected (T. 228), the Court overruled the objection in order to "put this in the proper setting." (T. 229) The apparent purpose of the questioning was to establish that Dr. Rosen had performed abortions prior to the occasion involving Mrs.

Lawrence. The deputy then detailed how he extracted from a garbage can "a soft pouch that was charred and burned," and when he took a look at it, "it was repulsive." He testified about how he contacted his supervisor and the coroner, and obtained instructions as to how to clean it and preserve it, and then proceeded to do so. (T. 230) It is submitted that the record does not reflect any relevance for this testimony, since Dr. Rosen acknowledged from the beginning that he was attempting to perform a procedure on Mrs. Lawrence which would have resulted in a purposeful abortion. The testimony was not relevant to the defense of the Sheriff and Deputy, because their right to investigate matters they believed to be criminal was not in issue at the time. The effect of the testimony was surely to inflame the jury.

3. When Dr. Rosen was called to the witness stand by Mrs. Lawrence's attorney, the trial judge began his own cross-examination of the physician. The Court interrupted counsel's line of questioning to establish that Dr. Rosen did not keep records (T. 167), at least of any abortions in 1969. The Court then examined Dr. Rosen as to how he paid his income tax if he didn't keep records. (T. 168) Later, after the subject had been at rest for some time, the Court brought it up again. (T. 170) The implication that Dr. Rosen must be doing something improper if he didn't keep records could not have been lost on the jury. When the next medical witness for Mrs. Lawrence was testifying on a totally different subject, the Court interrupted:

"THE COURT: Doctor, is it customary for a physician to keep records as to the patients he has treated and what he has found to be ailing them?

THE WITNESS: Yes, sir.

THE COURT: — and the treatment he gave them?

THE WITNESS: Yes, it is.

THE COURT: Go ahead." (T. 185)

It is apparent that the Court knew the answers to the questions he had directed to the witness. He simply assumed the role of the advocate while still on the bench.

Dr. Rosen, while acknowledging that he intended to perform an abortion on Mrs. Lawrence, testified that he was concerned about the possibility of carcinoma and thus intended to take a biopsy of the lining of the uterus from Mrs. Lawrence. The Court's questions on this subject:

"THE COURT: Doctor, is there any other way of doing a biopsy or getting a specimen without doing that whole curettage?" (T. 171)

* * * *

"THE COURT: Doctor, from what you say, any time a doctor performs an abortion, he

can simply say, "I was looking for cancer"; is that the way it is?" (T. 174)

When Dr. Rosen described his nurse as an excellent nurse, the Court interrputed:

"THE COURT: Wait; let's stop right there. Is she a trained nurse?

THE WITNESS: I trained her, sir, myself.

THE COURT: No, I mean, is she a trained nurse in the sense that she's qualified?

THE WITNESS: I would recommend her, sir.

THE COURT: Well, never mind that. I don't want your recommendations. Go ahead." (T. 175)

The entire tenor of the Court's conduct and comments clearly revealed to the jury that the Court felt abortion to be unacceptable conduct on the part of a physician. It is likely that this may have influenced the jury when it decided the issue of liability.

REASONS FOR GRANTING THE WRIT

1. This Court should enforce application of the necessary inferences of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, and *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739.

This Court has held that abortion, during the first trimester of pregnancy, is a right guaranteed by the Constitution. *Roe v. Wade, supra.* This right cannot be limited by state statute during the first trimester and physicians performing such abortions are protected. *Doe v. Bolton, supra.* When Dr. Rosen agreed to perform an abortion on Linda Lawrence in 1969, his action was protected by the Constitution in spite of Louisiana statutes prohibiting abortion. Such was the law when this case was tried before a jury in December, 1973.

At the trial, testimony was introduced to show that abortion was "illegal" under state law and Mrs. Lawrence's leading medical expert testified that biopsy procedures leading to loss of the fetus were not in keeping with generally accepted medical practice. Counsel for Mrs. Lawrence argued in summation that the jury should consider these matters when deciding the issue of malpractice. Additionally, the Court indicated by its conduct and comments that abortion was at least disapproved. It is submitted that under these circumstances a jury verdict favorable to Mrs. Lawrence was effectively coerced. This Court should enforce the intended implementation of the principles of *Doe* and *Roe, supra,* by granting the writ sought in this case.

2. This Court should provide more definite guidelines for a Federal trial Judge's comments upon the evidence.

Federal judges are, of course, clothed with all the common law powers of a trial judge. Among these is the power, denied many state court judges, to comment on the evidence. This Court has held:

> "In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination."
>
> *Quercia v. U.S.*, 53 S.Ct. 698, 699, 289 U.S. 466, 469 (1933)

Yet this Court also said, in *Quercia, supra:*

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the

> trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided." (citations omitted) 53 S.Ct. at 699

The foregoing general principles set forth by this Court, from a case decided upon challenged jury instructions, do not set forth sufficient guidelines for comments by trial judges in contexts other than the giving of jury instructions. During the trial of the case in the court below, the trial judge commented on the testimony of witnesses. He interjected questions and lines of questioning which challenged the credibility of one of the parties. It is submitted that there must be "safeguards against abuses," *Quercia, supra,* controlling such comments and conduct by trial judges which have not yet been satisfactorily set forth by this Court. The Court should grant certiorari in this case in order to set proper guidelines to be followed by trial judges in their comments to the jury and their conduct of the trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1978
Summary Calendar*

LINDA N. LAWRENCE,
Plaintiff-Appellee,

versus

FRANK M. EDWARDS, JR., ET AL.,
Defendants,

I. I. ROSEN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 25, 1974)

Before BELL, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1973

No. 74-1978
Summary Calendar

D. C. Docket No. CA-70-1840-A

LINDA N. LAWRENCE,
Plaintiff-Appellee,

versus

FRANK M. EDWARDS, JR., et al.,
Defendants,

I. I. ROSEN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BELL, SIMPSON and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: July 25, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Richard L. Edrington, P.O. Drawer 460, La Place, Louisiana 70068, counsel for the Respondent. I further certify that all parties required to be served have been served.

JACK PEEBLES
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305 Baronne Street
New Orleans, Louisiana 70112
Counsel for Petitioner

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SUPREME COURT, U. S.

FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-300

I. I. ROSEN,

Petitioner,

versus

LINDA N. LAWRENCE,

Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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I. I. ROSEN,

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LINDA N. LAWRENCE,

Respondent.

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, LINDA N. LAWRENCE, respectfully prays that this honorable court deny the petition for writ of certiorari requested by petitioner, I. I. ROSEN.

OPINION BELOW

The judgment of the Court of Appeals appears in the Appendix hereto. The judgment was rendered summarily without argument and without opinion and has not been reported.

JURISDICTION

Respondent says that the judgment of the Court of

Appeals for the Fifth Circuit was entered on July 25, 1974, and that this petition was filed timely and this court's jurisdiction is correctly invoked should it choose to issue said writ, which respondent respectfully prays that it will not do so.

QUESTIONS PRESENTED

1. Did the trial judge herein comment upon evidence and conduct the trial in this matter in such a manner as to reveal his opinion to the jury regarding the ultimate facts of the case?

2. Did evidence regarding the fact that abortions were illegal in the state of Louisiana and were also considered to be contrary to acceptable medical standards in the community establish malpractice on the part of defendant, petitioner physician, I. I. ROSEN, M.D.

CONSTITUTIONAL PROVISION INVOLVED

Respondent respectfully urges that there is, in fact, no constitutional questions presented to this honorable court, and that the right of trial by jury was preserved and not effected in any manner whatsoever in the trial of this matter.

STATEMENT OF THE CASE

Jurisdiction in the trial court was obtained by way of diversity of citizenship.

The cause of action in this matter is a suit by appellee against appellant on the grounds of professional medical

malpractice and a concommitant violation of the Louisiana Civil Code Article 2315. Also sued on the grounds of negligence were Frank M. Edwards, Jr., Sheriff of Tangipahoa Parish, Louisiana, and his deputy, George Holley. All those parties, other than Dr. Rosen, were found not to be guilty of any negligence.

This law suit was filed on July 9, 1970, and the trial was held in the United States District Court for the Eastern District of Louisiana in Section "A". It was presided over by the Honorable Herbert W. Christenberry, Judge. The jury returned a verdict in favor of Linda N. Lawrence and against I. I. Rosen, M.D., in the amount of Ten Thousand and No/100 ($10,000.00) Dollars, and the court made that verdict its judgment on December 21, 1973. Subsequent to the hearing of all of the evidence, trial counsel for Dr. Rosen moved for a directed verdict which was denied and subsequent to the judgment of the court, a Motion For Judgment Notwithstanding the verdict was denied. On February 28, 1974, I. I. Rosen, M.D. in proper person filed a notice of appeal. The judgment of the Court of Appeals for the Fifth Circuit was entered on July 25, 1974, after the matter was placed on the summary docket and said judgment was rendered without argument and without written opinion.

STATEMENT OF THE FACTS

During the spring of 1969 the office of Frank M. Edwards, Jr., Sheriff of Tangipahoa Parish, was investigating the defendant and appellant herein, I. I. Rosen, M.D., due to the suspicion of Dr. Rosen's performing illegal and non-therapeutic abortions. That investigation involved surveillance by one of his deputies, George Holley, from a home across the street from Dr.

Rosen's clinic in Amite, Louisiana. During the course of that surveillance, Deputy Holley took photographs of persons entering and leaving Dr. Rosen's clinic and attempted to follow up on his surveillance by speaking to some of those parties that he saw coming in and out of the clinic. During the course of the investigation, George Holley found in a garbage can outside Dr. Rosen's clinic the charred remains of a fetus (TR 230). During this period of investigation, Deputy Holley was dating Katrinka Legg, who was Linda N. Lawrence's roommate. He confided in her with regard to his investigation and eventually confided in Linda Lawrence also. He apparently seemed to be depressed and concerned; particularly after finding the fetus and told Mrs. Legg and Mrs. Lawrence about it. He indicated to them that it would be necessary for someone of proper age to pose as being pregnant, to enter Dr. Rosen's clinic for the purpose of an examination and thereby obtain evidence upon which the sheriff's office could base a case and thus apprehend Dr. Rosen. After discussion between Mrs. Lawrence and Mrs. Legg and Mrs. Lawrence and Deputy Holley, Mrs. Lawrence agreed to act as that person. She was advised by Deputy Holley that there would be no danger involved and that she would be fully protected and that she would be of great assistance to the sheriff's office. Mrs. Lawrence's testimony indicates that at the time she was a student at Southeastern Louisiana University majoring in social work with a minor in criminal justice (TR 33). It was this academic interest, as well as her respect for authority and desire to be of assistance, that encouraged her to go along with the request of Deputy Holley to become involved in this investigation.

Mrs. Lawrence initially was to enter Dr. Rosen's office hopefully when someone else was being aborted, thereby

making it easier for the sheriff's office to go into Dr. Rosen's office and make an arrest. During the course of this investigation, that game plan changed, and Mrs. Lawrence was advised that it would be necessary for her to receive a shot of sodium pentathol, which would render her unconscious. She was again advised of her safety and that the sheriff's deputies would be in close proximity to rush into Dr. Rosen's clinic and to arrest Dr. Rosen and to save her.

On July 15, 1969, Linda Lawrence went to the Rosen Clinic and told Dr. Rosen that she was married, that her husband was in Viet Nam, that she had had an affair, that she felt she was pregnant and was in need of an abortion. At that time Dr. Rosen gave her a pelvic examination and indicated to her that she should return to him with a urine specimen (TR 224). The next day Mrs. Lawrence returned to Dr. Rosen's office, he again examined her and the urine specimen turned out to be positive for pregnancy. Dr. Rosen gave Mrs. Lawrence some pills to take. She called Dr. Rosen regarding the pills and he indicated to her that she should return to see him. On July 28, 1969, after having been advised by Dr. Rosen that the cost of this abortion would be $300.00, Mrs. Lawrence returned to his office, at which the abortion was to be performed. Mrs. Lawrence knew that she would receive a shot of sodium pentathol (TR 55) and that she was to say "Ouch" upon receiving the shot, and she would be rescued.

Dr. Rosen under cross examination by counsel for appellee, indicated that he had advised Mrs. Lawrence that he would perform an abortion, but that due to the negative pelvic examination and the positive urine specimen, he was suspicious of choriocarcinoma, a dis-

ease which Dr. Rosen last saw, and only saw, when he was a senior in medical school in 1934, in Illinois at Cook County General Hospital (TR 172). As a result of that suspicion, without informing his patient, he decided to perform a D & C in order to obtain tissue to be examined by a pathologist for cancer. It is, of course, very convenient, that to perform a D & C to obtain tissue would result in an abortion of a pregnancy if there is, in fact, one there. Further, both Drs. Alford and Brown, board certified obstetrician-gynecologists indicated that:

1. They would not be suspicious of choriocarcinoma under the circumstances.

2. If, in fact, they were suspicious of cancer, they would not attempt to diagnose it in the manner in which Dr. Rosen did.

3. It is not necessary to obtain a D & C in order to obtain tissue for such a biopsy.

When Sheriff Edwards' deputies entered Dr. Rosen's clinic, they found Mrs. Lawrence comatose lying on the examining table. She was removed to the courthouse in Amite, Louisiana, and slowly began to regain consciousness. While there, she was assisted to the ladies room by her roommate, Katrinka Legg, who became alarmed when she noticed blood in Mrs. Lawrence's underwear and since Mrs. Lawrence had complained to her of abdominal pains. She and Mrs. Lawrence went to see C. D. Alford, M.D., an obstetrician-gynecologist in Hammond, Louisiana (TR 138). It was Dr. Alford's examination that verified the fact that Mrs. Lawrence had a perforated uterus. In order to observe Mrs. Lawrence and to assure that this matter did not become more serious than

it already was, she was placed in the Seventh Ward General Hospital in Hammond, Louisiana, where she stayed for approximately a week under his observation and care. Dr. Alford testified that in examining Mrs. Lawrence he passed a sound into her uterus and that it passed with ease all the way up to the hilt (TR 87). Further, with the history that Mrs. Lawrence gave Dr. Alford, he indicated that this was a positive sign of perforation of the uterus and that based on the history he received, it was the result of an operative procedure in Dr. Rosen's office.

Respondent offered Victor Brown, M.D., a board certified obstetrician-gynecologist, as an expert witness in this matter. Dr. Brown testified to several important things. First of all, he indicated that a D & C is in accordance with accepted medical practice when done in a hospital. He indicated that the passing of a probe or sound, which went all the way up to the hilt of the sound and met no resistance would indicate that there is, in fact, a perforation of the uterus (TR 180). Dr. Brown's testimony indicates that choriocarcinoma necessarily follows a delivery or a miscarriage or hydatit mole, an aberrant pregnancy. In answer to counsel for respondent's questions:

> "Q Now doctor, would it be in keeping with generally accepted medical practice based on the history I have, you would then proceed to perform a biopsy to determine whether or not the patient has choriocarcinoma?
>
> "A No, it wouldn't. To do a biopsy of the uterus, of course, would run the grave risk of disturb-

ing a normal type pregnancy. Secondly, this is not the way you diagnose choriocarcinoma. Choiocarcinoma, which I never did get fully to explain, is usually not found in the uterus, being that cancer has a tendency to spread to other parts of the body, most commonly to the lung and the brain. The way to make a diagnosis of choiocarcinoma is that usually when a patient has persistant positive pregnancy tests and the uterus is its normal size, when chest x-rays are obtained, you can see some sort of growth in the chest of the patient or the patient may have some sort of growth elsewhere in the body."

Mrs. Lawrence testified under direct examination, that subsequent to this bizarre set of circumstances, she noticed certain personality differences in herself. Further, Mrs. Legg, a close personal friend, and former roommate, also indicated that she noticed Mrs. Lawrence was less open, less candid, less frank, and less trusting subsequent to this incident than before. Subsequent to this incident, Mrs. Lawrence on several occasions saw Irving Fosberg, Ph.D., a clinical psychologist in New Orleans. Dr. Fosberg evaluated Mrs. Lawrence's condition based upon normal standard psychological testing and indicated that she was emotionally disturbed and in need of psychiatric care (TR 112). He indicated that the psychiatric care would be for a minimum of two years in duration and cost approximately $50.00 per hour at a minimum of two times per week and possibly as much as three times per week.

Dr. Fosberg indicated that he found Mrs. Lawrence, and I quote:

> "It certainly could, when measured by logic and the standard of medicine, psychiatry and psychology, I felt that she was in need of psychotherapy (TR 114)."

Based on the evidence brought out at the trial of this matter, of which only selected portions have been presented, the jury returned a verdict against Dr. Rosen for medical malpractice and awarded Mrs. Lawrence damages in the amount of $10,000.00.

ARGUMENT

Counsel for petitioner states throughout his brief that the court interjected its own view of this case prejudging it and accepting the theory of negligence offered by respondent and by attitude and statement making it clear to the jury that he joined in that theory.

He indicates that evidence of said acceptance and prejudice were certain statements made by the court and by witnesses which the court allowed to be said in spite of objections of counsel for Dr. Rosen.

Further, counsel for petitioner argues that any evidence regarding the illegality of non-therapeutic abortions in Louisiana in 1969 was irrelevant. At the time that the evidence regarding said illegality was offered to the jury, Sheriff Frank M. Edwards, Jr., of Tangipahoa Parish, Louisiana, and his deputy, George Holley, were both de-

fendants in the case, without evidence of the statutory illegality of abortions in Louisiana in 1969 being proved and being shown, there can be no basis for either Sheriff Edwards' having investigated the activities of Dr. Rosen or any reason for this bizarre and unfortunate incident to have occurred in the first place.

Counsel for petitioner also states that upon closing argument, counsel for Mrs. Lawrence used testimony regarding the illegality of abortions to establish malpractice and quotes from the transcript, page 293. Said argument to the jury indicated that in fact, which is a fact, abortions were illegal in Louisiana in 1969. The establishment of abortions as being illegal in 1969 was an essential part of the theory of the case against the sheriff's office in Tangipahoa Parish and their activities with regard to the investigation of Dr. Rosen. Further, the statement that abortions were not accepted medical practice deals with medical malpractice only and negligence arising out of said malpractice and has nothing, to do whatsoever with any criminal wrong doing. There was not an attempt by counsel for Linda Lawrence and especially by the court to indicate that this was anything more than a simple civil action arising out of negligence due to professional medical malpractice. Further, counsel for respondent respectfully refers the court's attention to the charge to the jury made by the trial judge.

> "This is a civil case, and the basis of it is simply that it is a malpractice suit. The charge is not commiting abortion, because we know there was nothing to abort. The question here was whether the procedure he gave was in accordance with good medical practice in this community, and whether the procedure he gave was performed in

an unskillful way which did not meet the medical standards of that community (TR 334)."

That is what was proven. That Dr. Rosen failed to meet the standards of care of a physician in his community. The petitioner's reference to this court's rulings in *Doe v. Bolton, 410 U.S. 179, 93 Supreme Court 739,* and *Roe v. Wade, 410 U.S. 113, 93 Supreme Court 705,* is simply a red herring, as there is no indication whatsoever in the record of the trial of this matter that it was the intention of the parties to circumvent or to change *Roe and Doe.* The reason is clear. They are distinguishable both on the facts and legally because:

1) *Roe and Doe* involved criminal prosecutions.

2) In neither case was there an allegation of civil malpractice on the part of the patient and both the patient and the physician willingly entered into the relationship with regard to their abortions.

3) There is no indication in this cause whatsoever of any attempt to deny what this court has declared to be the constitutional right of a party in the first trimester of pregnancy to end that pregnancy.

Further, the transcript of this trial is replete with the testimony of physicians regarding the procedures followed by petitioner that, in their opinions, were contrary to the standard of care expected of physicians in the community. Both physicians testified that a D & C would not be done in an office. Both physicians testified that a

D & C would not be done to diagnose choriocarcinoma. Both physicians indicated that they would not be suspicious of choriocarcinoma. The cause of action that this honorable court is presented with is not similar to *Roe and Doe* as it involves a cause of action for medical malpractice which exists independent of any legality or illegality, constitutionality or unconstitutionality, of abortions. In reference to *Roe and Doe*, is simply an attempt on the part of petitioner to apply this court's ruling in *Roe and Doe*, criminal case, to an action for civil damages arising out of mal practice which has a vitality independent of the constitutionality of the procedure performed by the physician. For it is not the procedure that is in question, it is the manner in which the procedure was performed that gave rise to this law suit. It is the manner in which the sheriff's office acted that gave rise to this law suit, and had petitioner perforated the uterus in the performance of a D & C independent of any attempt or lack of attempt to be involved in an abortion a claim for medical malpractice would still arise and would still depend upon the verdict of a jury and the judgment of the court to determine whether or not it had substance. In this cause of action it was the verdict of the jury and the judgment of the court that clearly stated the substantiality of the malpractice that was alleged.

The standard of care applicable to Dr. Rosen in the performance of his profession is no different in this case than it would be in any other cause, and applies equally to Dr. Rosen as it does to Dr. Alford, Dr. Brown, or any other physician practicing in the state of Louisiana. That standard is set out in the case of *Meyer v. St. Paul Mercury Indemnity Company, 225 La. 618, 73 So2d. 781*, and *George v. Travelers Insurance Company, 215 F. Supp. 340, 344 (1963).*

"A physician, surgeon or dentist according to the jurisprudence of the courts of the State of Louisiana, is not required to exercise the highest degree of skill and care possible. As a general rule, it is his duty to exercise a degree of skill ordinarily employed, under similar circumstances, by members of his profession in good standing in the same community or locality and that he used reasonable care and diligence along with his best judgment of the application of his skill to the case."

Petitioner states that the comments and the conduct of the trial judge demonstrated his prejudgment of the ultimate facts in the case, in favor of Mrs. Lawrence and cites certain examples. 1) It is stated the court said that the evidence is that he (Dr. Rosen) punctured the womb. It has long been established that a court may comment on the facts in the trial of a case and is not limited to instructions of an abstract sort. As long as his comments are controlled and exercised in conformity with the standards governing his judicial office, he may analyze and dissect the evidence but he may not add to or distort it. *Quercia v. U.S., 53 Supreme Court, 698, 699, 289 U.S. 466, 469 (1933)* there is no indication that the court attempted to add to or distort the evidence. There is no indication in the transcript of the record that the court did anything unjudicial, unbecoming, or prejudicial in commenting on the evidence.

2) Obviously, the purpose of the court's allowing the questions of counsel regarding the finding of a fetus in a garbage can outside Dr. Rosen's clinic was, in fact, done "to put this in the proper setting", as without the sheriff's office having evidence of the previous activities of Dr.

Rosen, there would have been no reason to investigate Dr. Rosen. Had there been no investigation of Dr. Rosen, there would be no cause of action because Linda Lawrence would never have entered his office. Counsel's statement in his brief on behalf of petitioner indicates that the testimony of Deputy Holley regarding his finding of the fetus in the garbage can was not relevant to the defense of the sheriff. As a matter of fact, the sheriff and his deputy were parties defendant to this law suit until the jury returned its verdict finding them not guilty of negligence and dismissing them from the case. Their right to investigate matters they believed to be criminal was, in fact, an issue at the time these questions were asked.

3) Dr. Rosen's keeping of records was clearly evidence as to the manner in which he performed the practice of medicine. Accepted medical practice procedure involves taking histories and keeping records, and knowing what you treat someone for, when you treated them, what was prescribed for them, what was wrong with them and why it was wrong with them. Dr. Rosen's failure to take histories and keep records is relevant and germaine to the issue of his practice of his profession in accordance with accepted medical procedure and established the fact that he did not take and keep a history for Mrs. Lawrence nor did he gave any record of a history, if in fact one was taken. And on the basis of no history taken or kept, he decided to perform a dilation and curretage for the purpose of diagnosing choriocarcinoma, which was never told to the patient, if that was Dr. Rosen's intention.

REASONS FOR DENYING THE WRIT

1) *Roe v. Wade* and *Doe v. Bolton* have no applicability to the case at bar. They involve criminal sanctions for

the performance of non-therapeutic abortions. The case at bar is a civil medical malpractice case and the jury was charged that, in fact, that is what they were to rule upon, not upon the legality or illegality of Dr. Rosen's actions, not upon whether or not he was, in fact, involved in an illegal, legal, existing, or nonexisting abortion.

2) It is therefore submitted that there were, in fact, no abuses of the jury trial rights of the defendant, and that any comments or questions asked by the court were entirely within the realm of the court's rights and in fact, its obligations in this matter, and consequently, certiorari should be denied in this matter.

CONCLUSION

For these reasons, the writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1978
Summary Calendar*

LINDA N. LAWRENCE,
Plaintiff-Appellee,
versus

FRANK M. EDWARDS, JR., ET AL,
Defendants,
I. I. ROSEN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 25, 1974)

Before BELL, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21[1]

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5 Cir., 1970, 431 F.2d 409, Part I.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1973

No. 74-1978
Summary Calendar

D. C. Docket No. CA-70-1840-A

LINDA N. LAWRENCE,
Plaintiff-Appellee,
versus

FRANK M. EDWARDS, JR., et al.,
Defendants,

I. I. ROSEN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

---

Before BELL, SIMPSON and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: July 25, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December, 1974, three copies of the Response to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Jack Peebles, Esquire, 1006 Baronne Building, 305 Baronne Street, New Orleans, Louisiana 70112, counsel for the Petitioner. I further certify that all parties required to be served have been served.

RICHARD L. EDRINGTON
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La Place, Louisiana 70068
Counsel for Respondent